

No. 4353

IN THE

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United States

Circuit Court of Appeals

For the Ninth Circuit.

WYATT LUMBER COMPANY, LTD., a Corporation,

Plaintiff in Error,

vs.

COOLEY HARDWOOD MANUFACTURING COMPANY, a Corporation,

Defendant in Error.

OPENING BRIEF
OF PLAINTIFF IN ERROR.

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May it Please the Court:

In this case before this Court a single question is involved. Does the complaint state facts sufficient to constitute a cause of action, and sufficient to support the judgment?

The complaint by the plaintiff, a corporation, alleges a contract by the Wyatt Lumber Co., Ltd., with one R. H. Cooley for the delivery of 500,000 feet of lumber. This contract as set up in the complaint provided for a five days credit to R. H. Cooley.

The plaintiff Cooley Hardwood Manufacturing Co., a corporation, in Paragraph VI of its complaint alleges:

1. That R. H. Cooley assigned to it the contract.
2. That plaintiff notified defendant of said assignment.
3. That thereafter defendant delivered to plaintiff approximately 30,000 feet of the lumber and no other lumber.

Plaintiff *does not allege* that the defendant *consented* to the assignment of said contract from R. H. Cooley to the plaintiff corporation.

In this connection we submit two propositions of law:

1. That a contract involving personal trust and confidence is not assignable by one party to it without the consent of the other party.

Arkansas Smelting Co. vs. Belding, 127 U. S. 5, C. T. 880, 379.

Demerest vs. Dunton Lumber Co., 161 Federal Rep. 264, in which it is said:

“While the authorities do not differ as to the principle that a contract personal in its nature cannot be assigned by one party without the consent of the other, they differ in the application of the principle; the question in each case being whether the contract is personal or not. The law on the subject for the Federal Courts has been laid down by the Supreme Court in Arkansas Smelting Company vs. Belding Mining Company, 127 U. S. 397 and 379, 8 Sup. Ct. 1308, 32 L. Ed. 246, in which Mr. Justice Gray said:

“ ‘At the present day, no doubt, an agreement to pay money or to deliver goods, may be assigned by the person to whom the money is paid or the goods are to be delivered, if there is nothing in the terms of the contract whether by requiring something to be afterwards done by him, or by some other stipulation, which manifests the intention of the parties that it shall not be assignable. But every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman: ‘You have the right to the benefit you anticipate from the character, credit, and substance of the party with whom you contract.’ *Humble vs. Hunter*, 12 Q. B. 310, 317; *Winchester vs. Howard*, 96 Mass. 303, 305, 3 Am. Dec. 93; *Boston Ice Co. vs. Potter*, 123 Mass. 28, 25 Am. Rep. 9; *King vs. Batterson*, 13 R. I. 117, 120, 43 Am. Rep. 13; *Lansden vs. McCarthy*, 45 No. 106. The rule upon this subject as applicable to the case at bar, is well expressed in a recent English treatise; ‘Rights arising out of contract cannot be transferred, if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided.’ *Pollock on Contracts*, 425.’ ”

2. A pleading is to be construed most strongly against the pleader.

21 Ruling Case Law, 464; 3 R. C. L. Supp. 1158.

We respectfully submit, therefore, that the complaint in this case does not state facts sufficient to support the judgment.

Respectfully submitted,
ALBERT I. LOEB,
Attorney for Appellant and Defendant.